EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC.	Plaintiff,	
v.		Civil Action No. 2:11-cv-512
AOL, INC., *et al.*,	Defendants.	

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM REGARDING MOTION TO SHOW CAUSE

Through its Supplemental Memorandum, Plaintiff yet again seeks to falsely cast aspersions on Google in support of its fourth motion for sanctions in this case.[1] (*See* Dkts. 200, 277, 282 (Plaintiff's first three sanctions motions); Dkts. 275, 697 (denying all three motions)). Google already demonstrated why, like Plaintiff's prior three motions, this one also should be denied. As discussed more fully in Google's Opposition to Plaintiff's underlying Motion to Show Cause (Dkt. 982), Google first produced 986 highly-confidential source code files (two million lines of code) as well as other technical documents showing the changes to the accused systems. Not only did Google produce the source code, but it went to great lengths to make this code as accessible and digestible as possible. For example, rather than dumping irrelevant code on Plaintiff and forcing Plaintiff to "go fish" for the relevant portions, Google carefully targeted its production to the source code files that show the changes between Old AdWords and New AdWords. As Google engineer Bartholomew Furrow explained at his deposition:

> So what happened is I – I looked for changes to the code that were relevant in my opinion to the changes between old AdWords and new AdWords. And what I did is I identified particular change lists that corresponded to changes – relevant changes. And each change list corresponds to a certain set of files.

(Dkt. 1005,[2] Ex. 8 (Furrow Dep. 224:1-7).) Google then produced "before" and "after" versions of this code, since this would be the easiest way for Plaintiff to identify and review the changes that were made to the code. (*Id.*, 224:18-21 ("And so I thought it would be most helpful to you if we – if I provided a version that – or both versions that would highlight the changes that took place . . . .").) Google even instructed Plaintiff on how to make a "diff" or redline copy to specifically show these changes between the "before" and "after" versions of the code. (Dkt. 983 (Sistos Decl.), ¶ 7.)

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[1] Plaintiff's first and third sanctions motions were denied in their entirety, while for the second sanctions motion the Court denied Plaintiff's actual sanctions requests and merely ordered Google to update certain U.S. revenue figures, as Google had already agreed to do. (Dkt. 697).

[2] The Declaration of Joshua L. Sohn and attached exhibits was filed on October 21, 2013 along with Defendants' Opposition to Plaintiff's Motion For Leave to File a Supplemental Memorandum Regarding Motion to Show Cause and Motion to Strike Plaintiff's Supplemental Memorandum. (Dkt. 1005.) In order to avoid re-filing documents already before the Court, Defendants' brief here cites to the October 21, 2013 Sohn Decl.

In neither his report nor his declaration does Dr. Frieder cite to a single document that Google had not produced by the August 25 deadline for production of relevant documents. Nor did Plaintiff in its Opening Brief on Post-Judgment Royalties. (Dkt. 1028.) And neither Dr. Frieder nor Plaintiff point to any fact regarding New AdWords that they could not ascertain from this initial production. Indeed, as shown by both parties' Opening Briefs, the facts underlying Plaintiff's claim that Google's New AdWords system is no more than a colorable variation from the Old AdWords system are not in dispute. In other words, Google's production of documents that were actually "relevant" to whether New AdWords is no more than a colorable variation of the old AdWords was spot-on.

Nevertheless, after Google had already produced any document that either party would rely on, Plaintiff engaged in a campaign to generate discovery disputes in order to create the false impression that Google had not complied with the Court's Order. Plaintiff first demanded that Google also produce custodial emails discussing the new system. Google did not agree that custodial emails were relevant to determining whether New AdWords is no more than a colorable variation of Old AdWords; that is shown in the source code Google produced. Moreover, the parties had agreed during pre-trial discovery that there was no obligation to preserve emails after the start of the litigation. (Dkt. 1005 ¶ 2 & Ex. 3.) It was also entirely reasonable for Google to read the Court's August 14 Order to implicate source code and technical documents rather than custodial emails, given that custodial emails are extremely voluminous and could not practically be collected and produced in just 10 days. (Dkt. 982, 5-6.) In the pre-trial discovery phase, review and production of custodial emails took two months. (*See id.*) The Court explicitly blessed that two-month timetable, finding it reasonable. (*See id.*)

Nonetheless, in the interest of compromise and to avoid unnecessary motion practice, Google agreed on August 28 to collect and produce custodial emails. (*Id.* at 4.) Google completed this production by September 13, 2013, producing over 9,000 pages of custodial emails to Plaintiff. Rather than meeting and conferring with Google about the scope of this production, the timing of this production, or anything else, Plaintiff abruptly filed its Motion to Show Cause on August 29, the day after Google had agreed to produce the emails in question. (Dkt. 978.)

On September 20, 2013, Plaintiff took the deposition of Google engineer Bartholomew Furrow. Plaintiff did not question Mr. Furrow on any of the 9,000 pages of custodial emails that Plaintiff argued were so critical in its Motion for Sanctions, despite Plaintiff's prior insistence that these emails be produced in time for the deposition. Then, after the Furrow deposition, Plaintiff requested additional categories of documents, and – continuing its efforts to work with Plaintiff in good faith to avoid unnecessary disputes before the Court – Google worked quickly to produce these newly-requested documents within 30 hours and in time for Plaintiff's expert reports. Google's actions do not remotely show a party that is disregarding its discovery obligations and/or deserves sanctions. Rather, Google's actions show a party that is working hard to accommodate Plaintiff's serial discovery requests in good faith to avoid unnecessary disputes and motion practice. Despite Google's good-faith efforts, Plaintiff has again rushed to the Court raising baseless requests for sanctions. As detailed below, Plaintiff's new accusations are just as baseless as its prior ones.

First, Plaintiff alleges that Google improperly deleted instant message chats about New AdWords. But the parties had agreed long ago that instant messages occurring after the filing date of the litigation need not be preserved or produced. In any event, Google's company-wide policy since 2008 has been not to record IMs in the first place. Google did not "delete" anything; it simply followed its long-time corporate policy in not recording these communications.

Second, Plaintiff alleges that Google did not create launch documents about New AdWords. But litigants have no obligation to create new documents just because their opponents would like to discover them. Google's decision not to create certain launch documents cannot be deemed improper as a matter of law.

Third, Plaintiff alleges that Google withheld calendaring documents and textual notes about its source code changes. These ministerial documents about the source code changes have little if any relevance to determining whether New AdWords is no more than a colorable variation of Old AdWords, particularly compared to the source code itself. But when Plaintiff stated that it believed these ministerial documents were relevant and asked that they be produced, Google promptly did so. Tellingly, Plaintiff did not cite any of these documents in its expert reports either, thus confirming that these ministerial documents about the source code (as opposed to the source code itself) are not relevant.

In reality, Plaintiff's Motion to Show Cause is nothing more than an unjustified attempt to win its post-judgment royalty case by default. Plaintiff seeks a default "death penalty" sanction – namely, an order that New AdWords is no more than a colorable variation of Old AdWords. Yet, as explained in Defendants' Opposition to the underlying Motion to Show Cause, such sanctions are reserved for "flagrant" behavior that is materially prejudicial to the opposing party. (Dkt. 982, 14 (citing *Wilson v. Volkswagen of Am.*, 561 F.2d 494, 504 (4th Cir. 1977)). Plaintiff cannot show flagrantly improper behavior by Google. To the contrary, Google has worked hard to accommodate Plaintiff's serial discovery requests, even after Plaintiff cast its net wider and wider by deeming more and more documents supposedly relevant to its case. And Plaintiff cannot show prejudice, as the only documents that Plaintiff's expert actually cited in his report are the source code and technical documents that Google originally produced by the Court's August 25 deadline.

Likewise, civil contempt sanctions of any kind are designed "to coerce the contemnor into compliance with court orders or to compensate the complainant for losses sustained." *Bradley v. Am. Household Inc.*, 378 F.3d 373, 378 (4th Cir. 2004). But Google has complied even with Plaintiff's serial, seemingly never-ending document requests. There is nothing to "coerce." And Plaintiff has suffered no prejudice, so there are no "losses" that require compensation. Accordingly, contempt sanctions of any kind are inappropriate, much less the death penalty sanction of a default judgment.

I. PLAINTIFF'S ALLEGATIONS OF DISCOVERY MALFEASANCE ARE MERITLESS

A. Google Did Not Delete Electronic Records

Plaintiff first argues that Google "deleted relevant electronic records" (Dkt. 1032, 1) by not preserving "chats" conducted over Google's instant messaging services, Google Talk or Google Hangouts. (*Id*. at 2-3.) But the parties explicitly agreed that "[n]o party ha[d] an obligation to preserve corporate voicemails or corporate instant messages created after" September 15, 2011. (Dkt. 1005 ¶¶ 3-6 & Exs. 1-2.) Here, Google's internal electronic chats certainly qualify as "corporate instant messages" that Google had no obligation to preserve, per the parties' agreement. That Plaintiff would seek a default judgment for Google's following the parties' agreement shows how meritless Plaintiff's request is.

And to be clear, Google did not "delete" anything. Nor did Google, as Plaintiff implies, alter its practices with respect to the chats at issue here. At Google, chats are not recorded as a matter of course. Google's company-wide corporate policy since 2008 has been by default to conduct all intra-company chats in "off-the-record" mode, meaning that such chats are not stored or recorded. (Dkt. 1004, ¶ 8.) This policy is consistent with the caselaw, which recognizes that parties have no obligation to preserve or record ephemeral, real-time conversations such as instant message chats. As one court noted, demanding that a defendant log every chat would be "akin to a demand that a party to a litigation install a system to monitor and record phone calls coming in to its office on the hypothesis that some of them may contain relevant information. There is no such requirement . . . ." *Malletier v. Dooney & Burke*, No. 04-5316, 2006 WL 3851151, at *2 (S.D.N.Y. Dec. 22, 2006). While Plaintiff's allegations may have some superficial rhetorical appeal, Google's engineers did nothing untoward here. Rather, they followed the parties' agreement in the case and the policy in place at Google since 2008.

B. Google Had No Obligation to Create Launch Documents

Plaintiff next argues that Google "purposefully avoided producing relevant launch documents" about changes to the accused systems. (Dkt. 1032, 1.) This allegation is also false. As Plaintiff indicates later on, its real complaint is that Google did not "create" documents, not that Google failed to produce documents that it had created. (*Id.* at 4 ("Google changed its general business practices to avoid creating relevant documents. . . . ").) So Plaintiff's real allegation is that Google somehow engaged in impropriety by not creating launch documents. This allegation also fails as a matter of law. It is a basic rule of civil discovery that parties have a duty to produce documents within their possession, but have no duty to create new documents. *See, e.g., Washington v. Garrett*, 10 F.3d 1421, 1437 (9th Cir. 1993) (affirming ruling "that the defendant was not required to create documents to satisfy [plaintiff's] discovery requests");

Brown v. Warden Ross Correctional Inst., No. 2:10-cv-822, 2011 WL 1877706, at *5 (S.D. Ohio May 16, 2011) (similar). Thus, Google's decision not to create launch documents cannot be deemed improper or sanctionable as a matter of law. Here too, Plaintiff has made spurious allegations of malfeasance with superficial rhetorical appeal, but devoid of any substance.

C. Google Promptly Produced the Textual Source Code Notes and Launch Cal Documents That Plaintiff Requested After the Furrow Deposition

Plaintiff finally enumerates other categories of documents that Google supposedly withheld – namely, a single Launch Cal document and textual notes about Google's source code changes. (Dkt. 1032 at 4-5.) The former is one ministerial calendaring document[3] while the latter are "vague" and "brief" notes on the source code changes. (Dkt. 1005, Ex. 8 (Furrow Dep. 230:17-22).) Notably, Plaintiff had one Launch Cal document in its possession before the Furrow deposition (Dkt. 1005, Ex. 10 and ¶ 15), yet Plaintiff gave no indication before the deposition that these Launch Cal documents had any relevance or that additional Launch Cal documents should be produced. Likewise, it is hardly uncommon for Google or any other software company to have a change list with textual notes of source code changes, yet Plaintiff expressed no desire for such textual notes before the Furrow deposition. Only three days *after* the Furrow deposition did Plaintiff first say anything about desiring these documents. The fact that Plaintiff waited until three days after the deposition before uttering a word about these ministerial documents shows that Plaintiff's demands are driven more by gamesmanship than a legitimate need for relevant documents.

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[3] As Mr. Furrow explained, "Launch Cal" is "short for Launch Calendar, and the basic notion is it contains a list of upcoming and past and current launches, thus the calendar aspect." (Dkt. 1005, Ex. 8 (Furrow Dep. 201:8-12).) Because Launch Cal documents are ministerial calendaring documents, they typically do not have significant notes on the substance of the various launches. (*Id.*, 201:25-202:23.) The one additional Launch Cal document that Google was able to find and produce after the Furrow deposition was attached as Dkt. 1005, Ex. 9. The Launch Cal document that Google had produced with its previous production was attached as Dkt. 1005, Ex. 10.

Google did not focus on these ministerial documents in its initial production because Google was focusing on producing the actual source code changes that these documents relate to. Google's focus on the source code, rather than additional ministerial documents about the source code, was borne out by the fact that Plaintiff's technical expert did not ultimately cite any of these additional ministerial documents in his expert report. Yet Plaintiff seeks the death penalty sanction of a default judgment simply because Google did not produce these ministerial documents before Plaintiff specifically asked for them.

In any event, Plaintiff admits that it first asked for these ministerial documents after the Furrow deposition and that Google promptly produced them at that time. (Dkt. 1032, 4-5.) Indeed, the parties' email correspondence shows that Plaintiff first asked for these documents the evening of September 23 and that Google produced them just 30 hours later. (Dkt. 1005, Exs. 4-5.) Thus, Plaintiff's allegation that Google engaged in malfeasance with respect to these documents should be rejected too. Rather, Google's production of these documents immediately after Plaintiff requested them shows Google's good-faith efforts to promptly produce all documents that Plaintiff deems relevant and asks to be produced. Google respectfully submits that entertaining Plaintiff's empty complaints only further encourages the parties not to cooperate, and to further waste party and Court resources with unnecessary motion practice as here.

II. PLAINTIFF HAS SUFFERED NO PREJUDICE

Even if the Court somehow found any impropriety in Google's good-faith initial production and its continued good faith in dealing with Plaintiff's subsequent requests, Plaintiff shows no prejudice from anything Google has done. Plaintiff points to no relevant fact as to whether New AdWords is more than a colorable variation from Old AdWords that it does not have or could not have discovered from Google's initial production of documents pursuant to the Court's August 14 Order. Indeed, Plaintiff's technical expert cited nothing other than the documents Google produced before the Court's deadline for production of documents regarding whether New AdWords is more than a colorable variation from Old AdWords. Nor did he state that he was unable to determine any of the relevant facts about New AdWords from Google's document production.[4] And to the extent Plaintiff needed more time to digest any of the documents subsequently produced in good faith in response to Plaintiff's serial requests, Plaintiff did not seek any extension of its expert report deadline in order to digest these documents (Dkt. 1005, ¶ 10) – an extension that Defendants would have gladly granted, had Plaintiff requested it. In fact, Defendants had previously offered up to a one-month extension of Plaintiff's expert report deadline in exchange for Plaintiff withdrawing its Motion to Show Cause. Yet Plaintiff, far from agreeing to an extension to moot the Motion to Show Cause, demanded that Google present Mr. Furrow for 14 hours of deposition (even though it ultimately ended up taking less than a seven hour deposition of Mr. Furrow), and, even though not called for under the Court's Order, answer an interrogatory before Plaintiff would withdraw this Motion. (*See* Dkt. 1005, Ex. 11, 2 & Ex. 12.)

In reality, the operation of New AdWords is undisputed. The expert reports of Plaintiff's technical expert (Dr. Frieder) and Defendants' expert (Dr. Ungar) do not conflict at all in their descriptions of how New AdWords actually operates. (*Compare* Dkt. 1005, Ex. 6 *with* Dkt. 1005, Ex. 7.) They merely conflict in their opinions on whether this undisputed functionality represents more than a colorable difference from Old AdWords. But that, of course, demonstrates no prejudice.[5]

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[4] Plaintiff's complaints regarding not having any electronic chats also ring hollow given that Plaintiff did not ask Mr. Furrow at his deposition regarding the substance of what was actually discussed in the chats, again showing that they were not genuinely interested in what was discussed, but rather in generating disputes.

In sum, Plaintiff presents no evidence that it suffered any prejudice from Google's document production, including its source code production. Indeed, as detailed above, the facts show just the opposite. Plaintiff is simply ginning up meritless accusations in an attempt to win its post-judgment royalty case by default. The Court should not indulge these tactics. As noted above, default sanctions are limited to flagrantly improper behavior that materially prejudices the rights of the opposing party, and Plaintiff has shown neither flagrantly improper behavior nor prejudice. Nor are contempt sanctions of any kind appropriate, as there is no need to coerce Google into compliance with the Court's Order or compensate Plaintiff for any losses that Plaintiff sustained (because Plaintiff sustained no losses).

DATED: November 5, 2013

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[5] On the issue of prejudice, Plaintiff also argues that Google's allegedly untimely production of English-language source code descriptions prejudiced Plaintiff because it "le[ft] I/P Engine to sort through the underlying code (968 source code files and almost two million lines of code (Dkt. 982, 3)) without the aid of these descriptions." (Dkt. 1032, 4.) If Plaintiff is trying to insinuate that Google dumped source code on Plaintiff without giving Plaintiff the tools to properly analyze it, this insinuation is meritless. As discussed above, Google carefully targeted its source code production to the files showing the changes between Old AdWords and New AdWords, and even instructed Plaintiff how to make a redline copy to highlight those changes.

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CERTIFICATE OF SERVICE

I hereby certify that, on November 5, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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